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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte TAE-SUNG KIM
and KYUNG-JIN YOO

Appeal 2009-002505
Application 10/767,281
Technology Center 2800

Decided: January 5, 2010

Before MARC S. HOFF, CARLA M. KRIVAK,
and THOMAS S. HAHN, *Administrative Patent Judges*.

HAHN, *Administrative Patent Judge*.

DECISION ON REQUEST FOR REHEARING

Appellants timely submitted, under 37 C.F.R. § 41.52, a Request for Rehearing dated November 23, 2009, which seeks our reconsideration of the decision in this appeal mailed September 22, 2009. On November 25, 2009, two days after the due date, Appellants submitted a Substitute Request for Rehearing (hereafter “Substitute Request”) with a statement asking that the first filed Request for Rehearing, which is referred to by Appellants as

“inadvertently filed,” be replaced by the then filed Substitute Request. We, as authorized by 37 C.F.R. § 41.4 (b)(2), now consider the Substitute Request.

The Examiner rejected: (1) claims 1, 2, 4-7, 14, 15, and 17-19 under 35 U.S.C. § 103(a) as being unpatentable over Ohtani and Maeda; and (2) claims 8, 9, 11-13, and 21-24 as being unpatentable over Ohtani, Maeda, and Yamazaki. In our prior decision, we affirmed these rejections of claims 1, 2, 4-9, 11-15, 17-19, and 21-24. Opinion 14.

We have reconsidered our September 22, 2009 decision in light of Appellants’ Substitute Request, and we find no errors. We, therefore, decline to change our prior decision for the following reasons.

I

Appellants contend that our decision inaccurately states a “criterion for obviousness under 35 U.S.C. § 103(a).” Substitute Request 4. Specifically, Appellants assert that our decision “illegally turns upon a determination of whether the Examiner’s proposed combination is expressly prohibited by the primary reference, (*i.e.*, the existence in the administrative record of substantial evidence such as a ‘teaching or suggestion in the Ohtani excluding the use of any aluminum alloy for source or drain electrode structures.’[D]).” *Id.*

Appellants here refer to our consideration of the Examiner’s reasoning in response to Appellants’ assertion in the Appeal Brief that “Ohtani ‘teaches away’ from using an aluminum alloy for source and drain electrodes, because the reference indicates that either an aluminum or an aluminum alloy can be used for gate electrode wiring, while being silent as to whether an aluminum alloy could be used for source and drain electrodes

(App. Br. 12).” Opinion 9. The Examiner’s reasoning turns on finding that Ohtani does not teach or suggest excluding aluminum alloys from use for source or drain electrode structures, which teaching or suggestion of exclusion we similarly failed to find. *Id.*

In the appeal record Appellants:¹

submitted that Ohtani et al. teaches away from a three-layer laminated structure of titanium/aluminum alloy/titanium in that there is an inference that Othani’s failure to indicate that an aluminum alloy can be used for the source wiring line and drain electrode after previously indicating that an aluminum or aluminum alloy can be used for the gate wiring line infers that Othani only considered pure aluminum for the source wiring line and drain electrode.

App. Br. 12. The appeal record further shows Appellants concluding from this teaching away assertion that “since Othani does not teach or suggest the [aluminum alloy] substitution [for source/drain electrodes], it would not be obvious to make such a substitution based on the teachings of Othani.”

Reply Br. 3.

Appellants’ asserted Ohtani fatal deficiency is addressed in the opinion by noting that “Appellants’ contention lacks evidence to support their assertion that Othani teaches away.” Opinion 9. In context, immediately preceding this lack of evidence identification is a citation with quotation from *In re Fulton*, 391 F.3d 1195, 1201 (Fed. Cir. 2004) ([M]ere disclosure of more than one alternative does not constitute a teaching away .

¹ The appeal record consists of: (1) Appellants’ Second Substitute Appeal Brief filed Feb. 8, 2008, (2) the Examiner’s Answer mailed May 5, 2008, and (3) Appellants’ Reply Brief filed June 16, 2008.

. . because such disclosure does not criticize, discredit, or otherwise discourage [the proposed] solution . . .”). *Id.*

Our reconsideration of the appeal record continues to find that Appellants have identified no evidence previously relied on, other than the assertion that Ohtani does not teach or suggest aluminum alloy substitution for source/drain electrodes. Accordingly, we continue to find on the appeal record that Appellants have failed to demonstrate that Othani criticizes, discredits, or otherwise discourages use of aluminum alloys for source/drain electrodes. We also continue to find on the appeal record that the Examiner has provided adequate reasoning for a § 103 combination of Ohtani and Maeda, and that Appellants have not persuasively rebutted the Examiner's prima facie rejections.

II

Instead of relying on the appeal record, i.e., the previously filed brief(s), Appellants supplement the Substitute Request with assertions and reliance on new evidence referenced as being in the administrative record. Such new evidence was not previously cited in the appeal record and relied upon to rebut rejections.

For example, Appellants in n.3 assert that “Othani makes but a solitary mention of process temperature, namely 250° C. for the formation of a silicon nitride film in a plasma CVD method. Column 9, lines 23-31.” This asserted process temperature evidence was not previously presented in any brief(s). Apparently, relying on this new assertion of process temperature evidence, Appellants argue for the first time in n.5 of the Substitute Request that “unlike *In re Fulton*, there is neither motivation or benefit obtained from inserting the [sic] into Othani's

‘titanium/aluminum/titanium’ source and drain wiring lines 206, 207, the TiN diffusion layer of the secondary reference.” Other examples of newly relied on evidence and associated arguments include reference to (1) an Ohtani “black mask 212” and a Maeda combination of layers 36, 34, and 32 with “an interlayer insulating film 28” (Substitute Request 8); and (2) Maeda disclosing that “boron (B) contained in the diffusion layer diffuses into the TiN layer, making it impossible to obtain good ohmic contact” (Substitute Request 22).

A request for rehearing filed under 37 C.F.R. § 41.52 does not provide Appellants an opportunity to assert newly relied on evidence or arguments, except in special circumstances. In relevant part, 37 C.F.R. § 41.52(a) directs that:

Arguments not raised in the briefs before the Board and evidence not previously relied upon in the brief and any reply brief(s) are not permitted in the request for rehearing except as permitted by paragraphs (a)(2) and (a)(3) of this section.

(2) Upon a showing of good cause, appellant may present a new argument based upon a recent relevant decision of either the Board or a Federal Court.

(3) New arguments responding to a new ground of rejection made pursuant to § 41.50(b) are permitted.

No new ground of rejection has been made pursuant to § 41.50(b), and Appellants have not sought permission as authorized by § 41.52(a)(2). Consequently, Appellants’ assertions in the Substitute Request of “[a]rguments not raised in the briefs before the Board and evidence not previously relied upon in the brief and any reply brief(s) are *not permitted* . . .” MPEP § 1214.03 (emphasis added).

DECISION

We have granted the Substitute Request to the extent that we have reconsidered our September 22, 2009 decision, but we deny Appellants' request with respect to making any modifications to the decision.

REHEARING DENIED

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